

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF PROFESSIONAL STANDARDS**

In re the Certificate of Need Application)	Docket No. 01-05-C-1052CN
of:)	Docket No. 01-05-C-1053CN
)	Docket No. 01-06-C-1071CN
)	
AUBURN REGIONAL MEDICAL CENTER to Establish a Level II Nursery)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER
)	
Applicant)	
)	
MULTICARE HEALTH SYSTEM And FRANCISCAN HEALTH SYSTEM-WEST)	
)	
Petitioners.)	
<hr style="border: 0.5px solid black;"/>		

An administrative hearing was conducted by Senior Health Law Judge Eric B. Schmidt, Presiding Officer for the Department of Health, in Kent, Washington, on October 3-5 and 30-31, 2001. Stephen I. Pentz, Attorney at Law, represented Petitioners Multicare Health System (Multicare) and Franciscan Health System-West (Franciscan) (jointly referred to as the Petitioners). Richard A. McCartan, Assistant Attorney General, represented the Certificate of Need Program of the Department of Health (the Program). Kathleen D. Benedict, Attorney at Law, represented Auburn Regional Medical Center (the Applicant). Duane Lodell, Jean Ericksen and Robert Lewis, certified court reporters, recorded the proceeding.

The proceeding was transferred to Health Law Judge John F. Kuntz, Presiding Officer on December 17, 2001, pursuant to RCW 34.05.425(7) and (8). Based upon the

hearing transcript, exhibits and post-hearing briefs presented in this matter, the Presiding Officer issues the following:

I. PROCEDURAL HISTORY

1.1 On May 14, 2001, Multicare Health Systems filed an Application for Adjudicative Proceeding to review the Program's decision to approve the Applicant's application to operate a Level II nursery, dated April 23, 2001. This application was assigned Docket No. 01-05-C-1052CN.

1.2 On May 14, 2001, Franciscan Health Care-West filed an Application for Adjudicative Proceeding to review the Program's decision to approve the Applicant's application to operate a Level II nursery, dated April 23, 2001. This application was assigned Docket No. 01-05-C-1053CN.

1.3 On May 30, 2001, the Program issued to the Applicant Certificate of Need No. 1228, allowing the Applicant to operate Level II nursery. Multicare Health System filed an Application for Adjudicative Proceeding to review the Program's issuance of Certificate of Need No. 1228 on June 18, 2001. This application was assigned Docket No. 01-06-C-1071CN.

1.4 On July 10, 2001, the Adjudicative Clerk Office issued a Scheduling Order/Notice of Hearing, scheduling a prehearing conference date on August 28, 2001, and hearing dates on October 1, 2 and 3, 2001.

1.5 On July 27, 2001, the Applicant served its First Set of Interrogatories and Request for Production of Documents upon Multicare.

1.6 On August 10, 2001, Multicare filed a motion to quash the Applicant's First Set of Interrogatories and Requests for Production of Documents.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER – Page 2 of 26

Docket Nos. 01-05-C-1052CN, 01-05-C-1053CN & 01-06-C-1071CN

1.7 On August 22, 2001, the Petitioners filed a Motion to Consolidate Adjudicative Proceedings and Motion for Continuance with the Adjudicative Clerk Office. The Petitioner moved to consolidate the three proceedings into a single adjudicative proceeding, and neither the Program nor Applicant opposed this motion. The Petitioner also moved to continue the discovery deadline, motion deadline, prehearing conference and hearing dates, and neither the Program nor Applicant opposed this motion.

1.8 On August 28, 2001, the Applicant filed its response to Multicare's motion to quash.

1.9 On September 5, 2001, Multicare filed its reply to Multicare's motion to quash.

1.10 On September 12, 2001, Senior Health Law Judge Eric B. Schmidt (Judge Schmidt) issued an Order on Motions to Consolidate and for Continuance. Prehearing Order No. 1. Under the terms of this order Judge Schmidt granted the Petitioner's motion to consolidate, and consolidated the applications under Docket No. 01-05-C-1052CN. Judge Schmidt also continued the discovery and motions deadlines, continued the prehearing conference to September 24, 2001 and continued the hearing dates to October 3, 4 and 5, 2001. In the event additional hearing dates were necessary, Judge Schmidt scheduled October 30 and 31, 2001, for the additional dates.

1.11 On September 20, 2001, the Petitioners filed a prehearing conference memorandum with the Adjudicative Clerk Office.

1.12 On September 20, 2001, the Applicant and Program filed a joint prehearing statement with the Adjudicative Clerk Office.

1.13 On September 25, 2001, the Adjudicative Clerk Office issued a Notice of Hearing, informing the parties of the location and time for the scheduled hearing dates.

1.14 On September 26, 2001, Judge Schmidt issued an Order on Motion to Quash Interrogatories and Requests for Production of Documents. Prehearing Order No. 2. The order granted Multicare's motion to quash the Applicant's first set of interrogatories, but denied Multicare's motion to quash the Applicant's requests for production of documents.

1.15 On October 1, 2001, the Applicant filed an amended witness list with the Adjudicative Clerk Office. By a separate letter of the same date, the Applicant provided additional exhibits (identified as exhibit A-1 and A-2) to the Petitioners, Program and Judge Schmidt.

1.16 On October 3-5 and 30-31, 2001, Judge Schmidt conducted the hearing in this matter. The parties elected to file post-hearing briefs in lieu of closing argument. Following receipt of the hearing transcript, the parties agreed to consult regarding the briefing schedule and notify Judge Schmidt in writing of the relevant dates.

1.17 On December 17, 2001, Judge Schmidt, pursuant to RCW 34.05.425(7) and (8), transferred the matter to the undersigned Presiding Officer.

1.18 On March 28, 2002, following the receipt of the complete hearing transcript, the Program filed a letter stating the parties' agreement on the filing of post hearing briefs. The schedule was modified by letter filed on April 22, 2002.

1.19 On May 3, 2002, the Applicant filed its Post-Hearing Brief (Opening Brief).

1.20 On May 6, 2002, the Petitioners filed their Post-Hearing Brief (Opening Brief).

1.21. On May 20, 2002, the Program filed its Post-Hearing Brief (Response Brief).

1.22 On May 31, 2002, the Applicant filed its Post-Hearing Response Brief.

1.23 On June 24, 2002, following correspondence with the parties, the Presiding Officer issued an Order Modifying the Posthearing Briefing Schedule. Posthearing Order No. 1. Under the terms of the order, the Petitioners were to file their response brief no later than July 26, 2002, and their reply brief no later than August 2, 2002. Additionally, the deadline for the submission of the reply briefs for the Applicant and Program was extended to August 2, 2002.

1.24 On July 29, 2002, the Petitioners filed their Post-Hearing Response Brief.

1.25 On August 5, 2002, the Program filed its Post-Hearing Reply Brief.

1.26 On November 21, 2002, the Applicant notified the parties and Presiding Officer by letter that it would not file a reply brief in this matter.

1.27 Pursuant to RCW 34.05.461(8)(a), the time for issuance of the final order was extended to February 21, 2003.

II. HEARING

2.1 Louis Pollack, M.D; Janis Sigman; Jill Howie; and Jodie Carona appeared as witnesses on behalf of the Applicant. Karen Nidermayer appeared as a witness on behalf of the Program. Sherry Edkins and Silvia Conley appeared as witnesses on behalf of the Petitioners.

2.2 The following Program exhibits were admitted, except as indicated:

Exhibit D-1: The Department Certificate of Need Record.

Tab A: Certificate of Need Application

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER – Page 5 of 26

Docket Nos. 01-05-C-1052CN, 01-05-C-1053CN & 01-06-C-1071CN

- Tab B: DOH 1st Screening Letter
- Tab C: Applicant's request for extension to respond to 1st Screening Letter
- Tab D: DOH letter granting extension to 1st extension
- Tab E: Applicant's response to 1st Screening Letter
- Tab F: DOH 2nd Screening
- Tab G: Applicant's 1st request for extension to respond to 2nd Screening Letter
- Tab H: DOH letter granting extension to 2nd Screening Letter
- Tab I: Applicant's 2nd request for extension to respond to 2nd Screening Letter
- Tab J: DOH 2nd letter granting extension to 2nd screening
- Tab K: Applicant's response to 2nd screening
- Tab L: DOH 3rd screening
- Tab M: Applicant's response to 3rd screening
- Tab N: Affected Party request for public hearing
- Tab O: Beginning of Review and Public Hearing Notice
- Tab P: Public Hearing Agenda and Sign In Sheet
- Tab Q: Public Comment Documents
- Tab R: Public Hearing Documents
- Tab S: Additional Information requested by DOH at public hearing
- Tab T: Rebuttal documents from Applicant and Affected Parties
- Tab U: Pivotal Unresolved Issue (PUI) Notice and Cover Letter

- Tab V: Affected Party Letters requesting PUI Information When Received
- Tab W: Applicant's Response to PUI
- Tab X: Affected Party Comments on PUI
- Tab Y: Affected Party & Interested Party Status Requests
- Tab Z: Research and Additional Information Considered By DOH:
1. Information Obtained by OHPDS
 2. Quality of Care Information on Universal Health Systems (UHS)
 3. Pediatric Advisory Committee Information
 4. Population Data
 5. DRGs and MDCs
 6. Mileage Chart
 7. Trauma Designation Information
 8. Charity Care Information
 9. Licensure Information and Internet Information on UHS
 10. Information on Unlicensed Activities
- Tab AA: Conditional Analysis/Decision
- Tab BB: Applicant's letter agreeing to conditions, CN # 1228 & DOH cover letter
- Tab CC: Public Hearing Tapes.

2.3 The following Petitioner's exhibits were admitted, except as indicated:

- Exhibit P-1 April 23, 2001 Letter: Department of Health (DOH) to Auburn Regional Medical Center (ARMC)(approval of certificate of need (CON) application)
- Exhibit P-2 DOH Analysis of ARMC CON application (4/23/01)
- Exhibit P-3 May 2, 2001 Letter: ARMC to DOH (acceptance of DOH conditions to issuance of CON)
- Exhibit P-4 May 30, 2001 Letter: DOH to ARMC (issuance of CON # 1228)
- Exhibit P-5 CON # 1228

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER – Page 7 of 26

Docket Nos. 01-05-C-1052CN, 01-05-C-1053CN & 01-06-C-1071CN

- Exhibit P-6 ARMC CON application dated May 4, 1999
- Exhibit P-7 May 27, 1999 Letter: DOH to ARMC (first set of DOH screening questions)
- Exhibit P-8 October 11, 1999 Letter: ARMC to DOH (ARMC response to first set of DOH screening questions)
- Exhibit P-9 November 12, 1999 Letter: DOH to ARMC (second set of DOH screening questions)
- Exhibit P-10 May 31, 2000 Letter: ARMC to DOH (ARMC response to second set of DOH screening questions)
- Exhibit P-11 July 25, 2000 Letter: DOH to ARMC (third set of screening questions)
- Exhibit P-12 August 17, 2000 Letter: ARMC to DOH (ARMC response to third set of DOH screening questions)
- Exhibit P-13 October 12, 2000 Letter: ARMC to DOH (ARMC response to information submitted by affected parties at public hearing)
- Exhibit P-14 February 12, 2001 Letter: DOH to ARMC (declaration of pivotal unresolved issue)
- Exhibit P-15 March 1, 2001 Letter: ARMC to DOH (ARMC response to DOH declaration of pivotal unresolved issue)
- Exhibit P-16 June 15, 1999 Letter: Franciscan Health System (FHS) to DOH
- Exhibit P-17 October 5, 1999 Letter: FHS to DOH
- Exhibit P-18 September 22, 2000 Letter: FHS to DOH
- Exhibit P-19 October 11, 2000 Letter: FHS to DOH
- Exhibit P-20 March 9, 2001 Letter: FHS to DOH
- Exhibit P-21 September 22, 2000 Letter: MultiCare Health System (MHS) to DOH
- Exhibit P-22 March 14, 2001 Letter: MHS to DOH
- Exhibit P-23 September 24, 2000 Letter: Valley Medical Center (VMC) to DOH
- Exhibit P-24 September 28, 2000 Letter: VMC to DOH

- Exhibit P-25 July 29, 1999 Letter: James Brusselback (Director of Enforcement, DOH) to ARMC
- Exhibit P-26 August 3, 1999 Letter: Jody Carona (consultant for ARMC) to James Brusselback
- Exhibit P-27 August 13, 1999 Letter: James Brusselback to Jody Carona
- Exhibit P-28 August 19, 1999 Letter: Jody Carona to James Brusselback
- Exhibit P-29 August 24, 1999 Letter: Jody Carona to James Brusselback
- Exhibit P-30 September 21, 1999 Letter: James Brusselback to ARMC and Jody Carona
- Exhibit P-31 November 19, 1999 Letter: Gary Bennet (DOH) to ARMC and Jody Carona
- Exhibit P-32 1998 DOH Quarterly Reports: Births and Newborn Days
- Exhibit P-33 1999 DOH Quarterly Reports: Births and Newborn Days
- Exhibit P-34 2000 DOH Quarterly Reports: Births and Newborn Days
- Exhibit P-35 2001 DOH Quarterly Reports: Births and Newborn Days
- Exhibit P-36 Washington State Hospital Association Volume Trend Report: Births at ARMC 1992-1999 (Limited to use for impeachment)
- Exhibit P-37 DOH Analysis: Table III (Source: DOH Analysis (4/23/01), pg. 6 (DOH Record, pg 1065)) (Calculations performed by Mr. Pentz, and admitted subject to that proviso)
- Exhibit P-38 DOH Analysis: Table IV (Source: DOH Analysis (4/23/01), pg 7 (DOH Record, pg 1066)) (Calculations performed by Mr. Pentz, and admitted subject to that proviso)

2.4 The following Applicant documents were admitted, except as indicated:

- Exhibit A-1 1-page King & Pierce County Hospitals' Neonates, Each DRG as Percentage of all DC, 2000 ARID (Not Admitted)
- Exhibit A-2 3-page Chart regarding LOC Guidelines II, IIA, IIB at Auburn Regional

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER – Page 9 of 26

Docket Nos. 01-05-C-1052CN, 01-05-C-1053CN & 01-06-C-1071CN

Medical Center as of October 2000 (Not Admitted)

- Exhibit A-3 Curriculum Vitae, Louis D. Pollack, M.D.
- Exhibit A-4 1-page King & Pierce County Hospitals' Neonates, Each DRG as a Percentage of each Hospital's Discharges, 1998 CHARS
- Exhibit A-5 Personal Resume, Janis R. Sigman
- Exhibit A-6 1 page chart containing historical and projected data regarding the following categories for the period 1994 thru 2000 (with record reference):
Historical: OB/GYN admits; babies (DRGs 385-391); Mothers Giving Birth (DRG 370-375); Level II admits; percent of Level II discharges to mothers giving birth; Births (per DOH records). Projected: Mothers Giving Birth (DRG 370-375) With/Level II; Mothers Giving Birth (DRG 370-375) Without/Level II; Level II Discharges; Percent of Level II discharges to Mothers Giving Birth
- Exhibit A-7 A map of southwest King County (demonstrative purposes only)

III. FINDINGS OF FACT

3.1 On May 6, 1999, the Applicant filed a certificate of need application to establish an intermediate care nursery and level II obstetric services (level II services) within space at its facility. Level II services are defined as "tertiary health services" (WAC 246-310-010), and a certificate of need is required prior to offering those services (WAC 246-310-020). Chapter 246-310 WAC does not contain any criteria by which to measure the need for level II services (in addition to the criteria set forth in WAC 246-310-210 through WAC 246-310-240), as opposed to specific criteria set forth for other certificate of need services (see kidney transplantation, WAC 246-310-260; Open heart surgery standards, WAC 246-310-261; and ambulatory surgery, WAC 246-310-270). In support of its application, the Applicant utilized the American

College of Obstetricians and Gynecologists (ACOG) Neonatal Guidelines to measure its ability to be able to provide level II services.

3.2 An accredited hospital that is designated as a level III trauma center, the Applicant determined that it had been providing intermediate care nursery and level II obstetric services from approximately 1996. Upon determining it had not obtained the required certificate, the Applicant applied in 1999 so that its level II service would comply with the “tertiary services” requirement in WAC 246-310-020.

3.3 The Program initiated the standard screening and review process for the Applicant’s application. This process included reviewing comments from affected parties, identifying and resolving a pivotal unresolved issue related to pro-forma financial information omitted by the Applicant, and issuing a written analysis of the Certificate of Need Application (the Analysis) regarding the Applicant’s proposal. Based on its review of the application, the 1080 pages of documents contained in the Program’s record (Exhibit D-1), research and information obtained by the Program from other sources (Exhibit D-1, pages 420 through 1057), and information received at the public hearing, the Program found the application consistent with applicable criteria. WAC 246-310-210 through WAC 246-310-240. The award of the certificate to the Applicant was made contingent upon the Applicant providing certain specified charity care information. Following receipt of the Applicant’s written agreement to comply with the charity condition, the Program issued Certificate of Need No. 1228 on May 30, 2001. Department Exhibit 1, Tab BB.

3.4 On May 14, 2001, the Petitioners (Multicare and Franciscan) filed an Application for Adjudicative Proceeding to review the Program’s decision to approve the

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER – Page 11 of 26

Applicant's application to operate a level II service. On June 18, 2001, Multicare filed a second Application for Adjudicative Proceeding following the Program's issuance of Certificate of Need No. 1228. Health Law Judge Eric B. Schmidt (Judge Schmidt) issued an order consolidating the three adjudicative proceedings requested by the Petitioners.

3.5 Judge Schmidt ruled at hearing to exclude documents which were not part of the underlying Program record (Exhibit D-1), except to the extent such documents offered an explanation of information specifically contained in the Program record. See October 3, 2001 Transcript, Pages 1-1 through 1-18, and page 1-91. This holding was consistent a previous ruling in an unrelated certificate of need matter. See Prehearing Order No. 6, Ear, Nose, Throat and Plastic Surgery Associates, P.S., Docket No. 00-09-C-1037CN (the ENT ruling). The ENT ruling held the purpose of the adjudicative proceeding provided by WAC 246-310-610(2) was not to supplant the certificate of need application review process. Rather the purpose is to assure that the procedural and substantive rights of the parties were observed and *that the factual record supported the Program's analysis and decision*. (Emphasis added). The record constituted all documents included and/or received by the analysis decision date (April 23, 2001), and the issuance of Certificate of Need No. 1228.

3.6 Karen Nidermayer, a health services consultant for the Program, processed the Applicant's proposal. Ms. Nidermayer considered the following factors in analyzing the proposal:

- A. The service population area, identified by the Applicant (southeast King County, which included all or a portion of the communities of

Auburn, Kent, Enumclaw, Pacific and Federal Way, and the city of Sumner in Northeast Pierce County), which the Applicant stated.

- B. Statistical data relating to the service area female population, based upon data obtained from two sources: Comprehensive Hospital Abstract and Reporting System (CHARS) (data that provides historical trends in discharges and length of stay for newborn parents) and Office of Hospital and Patient Data Systems (OHPDS) (date providing historical discharge data for the major diagnostic category). This data is reported by each hospital in Washington State.
- C. A five-year review of the relevant major diagnostic category (MDCs) related to births (MDC #15). This MDC consisted of the relevant diagnoses related groups (DRGs), and contains the DRG codes related to birth categories (excluding the DRG related to normal newborns).
- D. Statistical data for the service area female population.
- E. Number of births for King and Pierce Counties for 1995-2000.
- F. Information related to the special needs population (low income, teen pregnancies, racial and ethnic minorities, handicapped and other underserved groups) who were receiving care from the Applicant.
- G. Collecting pro forma information from the Applicant that showed the Applicant's projected OB/GYN and Neonatal Activity for the first three years of the operation.
- H. Information from affected and/or interested parties, both in support and in opposition to the Applicant's certificate of need application.

Based on this information, Ms. Nidermayer drafted an analysis of the certificate of need application submitted by the Applicant. Ms. Nidermayer determined, based on her analysis of that information, that the Applicant's proposal met the need criteria under WAC 246-310-210.

3.7 At hearing, Ms. Nidermayer provided the following information regarding her certificate of need analysis:

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER – Page 13 of 26

Docket Nos. 01-05-C-1052CN, 01-05-C-1053CN & 01-06-C-1071CN

- A. Methodology can help determine “need” but it is not the need determination itself. The need determination looks to the needs of the patient, not other providers in a given area. In conducting the analysis no information was obtained to verify or contradict information provided by the Applicant regarding the pro forma statistical data. The ACOG guidelines were used as a guideline, in the absence of any methodology for a level II project evaluation, for certificate of need purposes. While the Applicant did not meet the 1000 deliveries per year provided for in the third year of the ACOG guidelines, it did meet all other relevant guideline standards.
- B. Ms. Nidermayer found the Applicant’s pro forma calculations, showing a 10% annual volume increase in admissions, to be “reasonable”. This reasonableness determination was based on the Applicant’s information, and information provided by other individuals at the public hearing, showing an increase between 1998 and 1999. In examining the reasonableness of the statistical information provided, Ms. Nidermayer did not test the statistical information provided by the Applicant, nor did she attempt to uncover what percentage of the total population consisted of the special need population identified in the application.
- C. In making the certificate of need determination, Ms. Nidermayer did not conduct a survey with other providers in the service area (similar to those conducted in other certificate of need application areas) to determine the existing capacity of level II beds available with other providers. No survey was performed because there was no specific methodology set forth in chapter 246-310 WAC that required such an analysis. Additionally, no such information was obtained or offered to the Program by other interested or affected parties during the public hearing process. Ms. Nidermayer stated she did not think the Program had a specific duty to go out and pull in or solicit information from existing providers. “I think existing providers have a responsibility to provide that to us. They know what we’re reviewing, they know what the project is, they attend the public hearings, they have ample opportunity to do it.” (See Transcript of Proceedings, Day 2, pages 189-190).
- D. In reaching the Program decision, Ms. Nidermayer emphasized the special population needs criteria presented to the Program by the Applicant (see Exhibit D-1, pages 242 through 262). These criteria included low income levels in the population to be served, including higher public assistance rates; distance to services and the inability or limited ability of the population to travel for services; adolescent pregnancy complication factors; the number of special nursery care

days; teenage pregnancy issues; and care for members of the Muckelshoot Indian Tribe, who fell in several of the other categories. The Applicant stressed the distance to obtain services to be a key factor, and Ms. Nidermayer gave weight to this factor in reaching the Program's decision.

- E. In addition to the factor set forth in item D above, Ms. Nidermayer emphasized the effect reduction or elimination of the Applicant's level II services would have on the special needs population's ability to obtain level II service.

3.8 Ms. Nidermayer included in her analysis the information received both in support (see Exhibit D-1, pages 1068-1069) and in opposition (see Exhibit D-1, page 1064) to the level II services being provided by the Applicant. The opposition was based on the Applicant:

- A. Not having a sufficient delivery volume to justify the additional level II nursery services being proposed;
- B. The failure to document additional need, given the decrease in population projected for the King County area over the next five years;
- C. In addition to Valley Medical Center, the availability of two other level II facilities, and one level III facility, within approximately 15 miles of the Applicant (Good Samaritan Community Health Center, St. Joseph Medical Center, and Tacoma General Hospital); and
- D. Nothing in the Applicant's application that indicates that these hospitals are unable to handle current or future demands for level II nursery services in the relevant communities.

3.9 Sherry Edkins and Sylvia Conley, appearing on behalf of the Petitioners, testified their respective facilities (Franciscan Health Care/St. Joseph Medical and Multicare Health Systems/Tacoma General Hospital) could accommodate the approximately 139 level II patients anticipated by the Applicant in its third year of operation (see Exhibit D-1, page 1063, Table II, Neonatal Services).

3.10 Louis D. Pollack, M.D., a neonatologist on staff at the Applicant's facility, stated that during his 20 years of practice in Washington, he created or assisted in the creation of 9 level II nurseries in King and Snohomish County. At no time during the creations of these level II nurseries did he apply for a certificate of need, as intermediate care nursery and/or obstetric level II services were not defined as "tertiary services", thus requiring a certificate of need to conduct these services. These 9 hospitals, and many other hospitals, were "grandfathered" and granted their level II status by the fact that they were providing level II services at 1988-1989, a factor considered or reviewed by Ms. Nidermayer in her analysis. Exhibit D-1, pages 1067-1068. The Applicant's hospital, not having been grandfathered in, therefore needed to apply for the certificate of need requirement.

3.11 The Presiding Officer finds the record does not show, and the Petitioner did not submit evidence at hearing, contesting the certificate of need factors contained in WAC 246-310-220 (determination of financial feasibility), WAC 246-310-230 (criteria for structure and process of care), and/or WAC 246-310-240 (determination of cost containment). Based on a review of the record, and the absence of any Petitioner contention to the contrary, the Presiding Officer therefore finds the Program has proven these certificate of need requirements.

IV. CONCLUSIONS OF LAW

4.1 Within the scope of its authority, an agency may commence an adjudicative proceeding at any time with respect to a matter within the agency's jurisdiction. RCW 34.05.413(1). The Department of Health is the agency responsible for the management of the certificate of need program under chapter 70.38 RCW.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER – Page 16 of 26

Docket Nos. 01-05-C-1052CN, 01-05-C-1053CN & 01-06-C-1071CN

WAC 246-310-010. Applications for licenses that are contested by a person having standing to contest under the law shall be conducted as an adjudicative proceeding.

RCW 34.05.422(1)(b).

4.2 The order shall be based on the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs.

WAC 246-10-606. In all cases involving an application for license the burden shall be on the applicant to establish that the application meets all applicable criteria, and in all other cases the burden is on the department to prove the alleged factual basis set forth in the initiating document. WAC 246-10-606. Except as otherwise provided by statute, the burden of proof is a preponderance of the evidence. WAC 246-10-606. The Presiding Officer concludes the evidence in the present matter consists of the Program's record (Exhibit D-1) ending with the issuance of Certificate of Need No. 1228 and such testimonial and documentary evidence obtained at hearing that explains the contents of that record. See ENT & Plastic Surgery Associates, Docket No. 00-09-C-1037CN.

4.3 The findings of the Department's review of certificate of need applications, and the action of the secretary's designee on such actions shall, with the exceptions provided for in WAC 246-310-470 and 246-310-480 be based on determinations as to:

- (a) Whether the proposed project is needed;
- (b) Whether the proposed project will foster containment of costs of health care;
- (c) Whether the proposed project is financially feasible; and
- (d) Whether the proposed project will meet the criteria for structure and process of care identified in WAC 246-310-230.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER – Page 17 of 26

Docket Nos. 01-05-C-1052CN, 01-05-C-1053CN & 01-06-C-1071CN

WAC 246-310-200(1). See also RCW 70.38.115(2). Criteria contained in this section and in WAC 246-310-210, 246-310-220, 246-310-230 and 246-310-240 shall be used by the Department in making the required determinations. WAC 246-310-200(2).

4.4 The determination of need for any project shall be based on the following criteria, except these criteria will not justify exceeding the limitations on increases of nursing home beds provided in WAC 246-310-810:

- (1) The population served or to be served has need for the project and other services and facilities of the type proposed are not or will not be sufficiently available or accessible to meet the need. The assessment of the conformance of a project with this criteria shall include, but need not be limited to, consideration of the following:
 - (a) In the case of a reduction, relocation, or elimination of a service, the need of the population presently has for the service, the extent to which the need will be met adequately by the proposed relocation of by alternative arrangements, and the effect of the reduction, elimination, or relocation of the service on the ability of low-income persons, racial and ethnic minorities, women, handicapped persons, and other underserved groups and the elderly to obtain needed health care; ...
- (2) All residents of the service area, including low-income persons, racial and ethnic minorities, women, handicapped persons, and other underserved groups and the elderly are likely to have adequate access to the proposed health service or services.

WAC 246-310-210. The findings of the Program's review of the certificate of need application shall be in writing and include the basis of the decision and shall use all criteria contained in chapter 246-310 WAC applicable to the proposed project. See WAC 246-310-490(1). This includes written findings on the extent to which the project meets the criteria set forth in WAC 246-310-210(1) and (2). See WAC 246-310-490(1)(c).

4.5 The Petitioners contend, in relevant part, that the Applicant's proposed project does not satisfy each of the applicable review criteria, asserting that the proposed project does not satisfy the need component under WAC 246-310-210. The Petitioner does not contest that the Applicant's proposed project fails to satisfy the applicable review criteria under WAC 246-310-220 through WAC 246-310-240. The Presiding Officer concludes the findings contained in the Program's analysis, and the Petitioner's failure to contest those findings, are therefore proven in this matter. The Applicant's certificate of need application, and the Program's analysis and decision to grant Certificate of Need No. 1228, rests upon whether the need criteria has been met in this case.

4.6 The Petitioners contend that the Applicant's proposed project does not satisfy each of the applicable review criteria, asserting that the proposed project does not satisfy the need component under WAC 246-310-210. The Petitioners also contend the Program committed critical legal errors in issuing the analysis, as the Program:

- A. Failed to analyze, and/or issue written findings, upon the applicable review criteria.
- B. Issued findings for which there is not sufficient factual support.
- C. Failed to obtain sufficient information to enable it to analyze the applicable review criteria.

4.7 The Petitioners contend the Applicant, in order to demonstrate the need component, must meet both of the criteria contained in WAC 246-310-210(1). In other words the Applicant must demonstrate that the population being served has a need for the project, and, of equal importance, must demonstrate that other services and

facilities of the type proposed are not or will not be sufficiently available or accessible to meet the need.

4.8 The Presiding Officer, in reviewing the record in this matter, believes the first factor under WAC 246-310-210(1) has been met, both by the Applicant and the Program. There is sufficient evidence in the certificate of need record, and the Program's analysis, to establish that the population served has a need for the project. The Applicant has been providing the level II services to the defined local community (see Finding of Fact 3.6(A)) since at least 1996. In other words, there is statistical evidence to show that level II services have been provided to the local community during the period 1996-1999, and this service is in excess of the level II services provided by the other providers in the service area. Additionally, the Applicant made a showing that additional need would be required within that service area. This need was based upon the Applicant's projection of future utilization. There is nothing in WAC 246-310-210 precluding the Program, upon determining the evidence (the Applicant's projection) presented to it was the kind of evidence upon which reasonably prudent person are accustomed to rely on in the conduct of their affairs, from adopting this statistical information as its finding in determining need in this matter. If the Program totally relied on the Applicant's projection, without more, the Presiding Officer might be inclined to give the Petitioners' contention more weight here. However, the Program's determination of the "reasonableness" was also based upon a comparison to other relevant statistical evidence available to it at the time of the determination. Exhibit D-1, 1065 – 1072).

4.9 The Petitioners contend the Applicant's application does not meet the need requirement, in part, because it does not meet the ACOG diagnostic data guidelines. More specifically, the Applicant, in performing 840 OB/GYN and neonatal activity level services, does not perform the necessary OB/GYN and neonatal activity level (at least 1000 admissions) anticipated by the guidelines. However, the Applicant projected it would reach that level of service by the third year of its pro forma statement. Additionally, there is no evidence to refute that the Applicant met all ACOG guidelines except for the projected OB/GYN activity level (see Exhibit D-1, pages 1070 to 1072).

4.10 Of greater importance, this measurement is a *guideline*, and not a specific requirement adopted as a part of the relevant RCW and WAC provisions. Absent a specific requirement in statute or regulation, the Applicant's failure to meet that guideline does not preclude, absent more, a finding of need in this case.

4.11 The Petitioners contend the Program failed to properly analyze the pro forma calculations, as the Program did not test the statistical information, nor did it attempt to uncover the percentage of the special need population identified in the application. The record contains some information provided by the Applicant regarding the special need population (see Exhibit D-1, pages 243-262), but not the actual percentage of the total OB/GYN activity. Ms. Nidermayer admitted during her testimony that she neither tested the statistical information nor attempted to uncover this information.

4.12 The Presiding Officer believes it would be prudent practice for the Program to test statistical information, and to attempt to uncover information such as relevant percentage information regarding the special need population, especially

where, as here, its decision is largely based on this special population factor. Many other certificate of need programs in chapter 246-310 WAC (such as open heart surgery standards, ambulatory surgery facility standards and kidney disease treatment centers), require meeting specific standards. It is not unrealistic to expect the Program to consider such information in a manner consistent with the other listed programs. However, chapter 246-310 WAC does not specifically provide such standards regarding proposed level II services, and the Presiding Officer therefore concludes the Program's failure to conduct such calculations does not prevent a finding of need in this matter.

4.13 The Petitioners contend the Program failed to evaluate, or issue a written finding upon, whether existing level II services are sufficiently available or accessible. Although there was testimony at hearing that other level II facilities in the geographic area could and would be willing to provide level II services to the special needs population, and Ms. Nidermayer did not conduct a survey with other providers in the service area, it appears to be the Program's position that the affected and/or interested party has a positive duty to provide the Program with information, rather than the Program having a specific duty to go out and pull in or solicit information from existing providers.

4.14 It is unclear to the Presiding Officer, following his review of Ms. Nidermayer's testimony, whether it is the Program's policy to shift the burden of proof in certificate of need matters to the affected and/or interested parties contesting the Program's decision, by expecting such parties to provide information. If it is the Program's position that the affected/interested party *must* provide it with information, and that the Program is not *required* to produce sufficient evidence in support of its

decision, that position is both misplaced and legally incorrect. The applicant must initially provide sufficient proof or documentation to support its application request. It is the Program's responsibility to ensure that the burden of proof (that is the burden of going forward with the evidence and the burden of persuasion on the relevant issue) is contained in its analysis and supports its certificate of need decision. This is both logically consistent with the requirements set forth in the statutes and/or regulatory requirements and legally required to provide the required due process notice in support of its decision. Having so stated, the Presiding Officer notes the Petitioner could have chosen to include such evidence or statistical information in support of its position and neglected to or chose not to do so.

4.15 At hearing Judge Schmidt allowed the testimony of Ms. Edkins (and later on Ms. Conley) on the issue of the ability of the Petitioners' facilities to absorb additional level II patients at their respective facilities. The Presiding Officer notes this testimony was not allowed to supplement the record regarding the ability of their respective facilities to accommodate the level II services, but to determine whether there was information that the Program should have obtained when making its decision.

October 30, 2001 Hearing Transcript (PM), 32-33. For that reason, the Presiding Officer concludes this information should not be included in the certificate of need record, and cannot be used in support of the Petitioners' case to show whether the facilities in question could accommodate additional level II services.

4.16 While it would have been prudent to survey the other level II providers in this case (that is, process the certificate of need application in a manner consistent with the standards set in other certificate of need cases), the Presiding Officer concludes the

failure to do so here does not preclude a finding of need. The Petitioners did not provide evidence at hearing, or point to evidence in the certificate of need record, to contest that the Auburn area has a very high percent of special needs mothers needing level II services. There was sufficient evidence to show that this special need population required services be local in nature, given the financial constraints experienced by the special needs population. The Program's analysis contained a reference to, and the certificate of need record contained evidence of, both a need and appreciation for such services in the service area. Exhibit D-1, pages 264- 270. The Petitioners did not provide evidence showing that their facilities could specifically address the needs of the Muckleshoot Indian Tribe, a specific subcomponent of the special need population. While the geographic distance between facilities and/or cities is small in some circumstances (that is, less than 20 miles), those distances do not accurately address the relevant issues.

4.17 In addition to the other information provided, the Applicant emphasized, and the Program gave great weight in its analysis, to the special need population identified in the application. This population required, and is projected to require, level II services in the Auburn area. This is a requirement that is specifically addressed and/or set forth in WAC 246-310-210(1)(a). Additionally, the Legislature specifically recognized the need to provide accessible health services in its declaration of policy. See RCW 70.38.015(1). The Presiding Officer concludes the Petitioners did not submit sufficient evidence in the record, or that was admissible at hearing, to contradict the need requirement contained in the Applicant's application, or the Program's analysis of that need requirement in support of its decision to issue Certificate of Need No. 1228.

4.18 The Presiding Officer therefore concludes the Program's analysis contains sufficient written findings to support its decision granting the Applicant's certificate of need application. The Program provided a written analysis. Its analysis contains sufficient information to explain the reasons for the Program's decision. It would be impractical to require the written analysis to be a recitation of the entire record, and the analysis need only contain a summary of the information used in reaching the certificate of need decision, so long as footnotes or other references are made to the relevant materials. So long as the analysis contains a summary of the relevant material, based on the certificate of need requirements set forth in rule and statute, and specifically refers to specific documents and other statistical data utilized in reaching that decision, the Presiding Officer concludes that analysis meets the statutory/regulatory requirements. Considering the volume of information obtained by the Program in completing the entire process, this is a reasonable approach. This is so because the analysis only needs to contain "written findings on the extent to which the project meets the criteria set forth in WAC 246-310-210(1) and (2)". The Presiding Officer concludes the Program's analysis meets that requirement.

V. ORDER

Based on the foregoing Procedural History, Findings of Facts and Conclusions of Law, the Program's Analysis of the Certificate of Need Application issued on April 23, 2001, and Certificate of Need No. 1228, dated June 18, 2001, are each AFFIRMED.

